91-431

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ROBERT F. MURPHY,

Plaintiff,

v.

KLEIN TOOLS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The Tenth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

ROBERT L. POTTROFF
WM. SCOTT HESSE
MYERS, POTTROFF & BALL
320 Sunset Avenue
Post Office Box 489
Manhattan, Kansas 66502
(913) 539-4656
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether this Court should adopt a blanket rule which provides that a dismissal based on a statute of limitations defense always bars a subsequent action filed in another jurisdiction even when the second jurisdiction is not obligated to apply the same statute of limitations.

Whether the concept of federalism will allow a federal procedural rule to circumvent a state's judicially and legislatively adopted substantive law that provides plaintiff with a right to bring his case under state law.

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No. _____

In The

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October Term, 1991

ROBERT F. MURPHY,

Plaintiff,

v.

KLEIN TOOLS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The Tenth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Petitioner Robert F. Murphy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in Case No. 90-2195 on June 7, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Murphy v. Klein Tools, Inc.*, ___ F.2d ___ (1991) which is printed at App. 1. The order granting Summary Judgment by the United States District Court for the District of New Mexico is unreported. See *Murphy v. Klein Tools, Inc.*, (D.C. N.M., August 8, 1990) which is printed at

App. 10. The order of dismissal by the United States District Court for the District of Kansas was rendered on September 5, 1989, and is unreported. See *Murphy v. Klein Tools, Inc.*, (D. Kan. September 5, 1989) which is printed at App. 15.

JURISDICTION

On June 7, 1991, the United States Court of Appeals for the Tenth Circuit granted in part Robert F. Murphy's petition for a rehearing. After granting Robert F. Murphy's petition in part and substituting its previous order with a published opinion, the petition for rehearing en banc was denied. This court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Article III, section 2:

> "The Judicial Power shall extend to all cases, in the Law and Equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority: . . . between citizens of different states:. . . . "

The relevant statutory provisions are F.R.Civ.P. Rule 41(b) which states in pertinent part:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this

> rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits."

New Mexico Stat. Ann. 37-1-14 provides:

> "If after the commencement of an action, the plaintiff fails therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated be deemed a continuation of the first."

The Doctrine of *res judicata*.

STATEMENT OF THE CASE

This case is a personal injury case arising from an accident occurring on August 14, 1980. The plaintiff, Robert F. Murphy, is a resident of Kansas. The defendant is Delaware corporation. The accident occurred near Farmington, New Mexico. The plaintiff filed suit on August 12, 1983, in the United States District Court for the District of Kansas. The State of Kansas has a two year statute of limitations for personal injury occurring within the State of Kansas. See K.S.A. 60-513. The State of New Mexico, where the accident and subsequent injury occurred, has a three year statute of limitations. See N.M.S.A. 37-1-8.

The defendant filed a Motion to Dismiss for failure to comply with the Kansas statute of limitations, K.S.A. 60-513. The plaintiff moved the Court to transfer the action to the United States District Court for the District

of New Mexico. The Court denied the plaintiff's motion. The plaintiff moved to amend his pleadings. The Court denied the motion. Prior to the Court entering its decision, the plaintiff moved that the judgment of the Court be entered without prejudice. The Court entered a Final Judgment in a Civil Case stating:

> **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. IT IS ORDERED AND ADJUDGED that the plaintiff's action is dismissed with prejudice for failure to file it within the limitation period of K.S.A. 60-513.

Prior to the entry of judgment by the United States District Court for the District of Kansas the plaintiff filed suit in the state courts of New Mexico. The New Mexico state court petition was filed on September 1, 1989, and service of process of the defendant was ultimately obtained. The defendant removed the New Mexico state action to the United States District Court for the District of New Mexico based upon diversity of citizenship and the amount in controversy. The New Mexico federal District Court granted summary judgment based upon the doctrine of res judicata and F.R.Civ.P. Rule 41(b). See *Murphy v. Klein Tools, Inc., supra,* App. 10. The New Mexico federal District Court found that when a claim is dismissed "with prejudice" the claim is dismissed on the merits unless the three exceptions stated at F.R.Civ.P. Rule 41(b) are met. The federal District Court also found that the action was dismissed because it was barred by a statute of limitations and "not for lack of jurisdiction, for

improper venue, or for failure to join a party under Rule 19."

The plaintiff appealed the federal District Court's decision to the United States Court of Appeals for the Tenth Circuit. In its decision the Tenth Circuit disregarded *Costello v. United States*, 365 U.S. 265 (1961) which stands for the proposition that F.R.Civ.P. Rule 41(b) did not change the common law rule that a dismissal of a complaint based upon a precondition, such as the statute of limitations, does not amount to a decision based upon the merits of a case. See *Murphy v. Klein Tools, Inc., supra,* App. 1. The Tenth Circuit overruled the case of *Stokke v. Southern Pacific Co.*, 169 F.2d 42 (10th Cir., 1948) which stated that a decision based upon a statute of limitations is *not* a decision on the merits. The Tenth Circuit decision relied heavily on *Shoup v. Bell and Howell Co.*, 872 F.2d 1178 (4th Cir., 1988). In its decision the Tenth Circuit disregarded the well reasoned dissent in *Shoup v. Bell and Howell Co., supra,* which states the majority holding in *Shoup,* is a "fundamental misunderstanding of the Supreme Court's decision in *Costello.*"

In its decision the Tenth Circuit found that the decision of the United States District Court for the District of Kansas was a determination upon the merits pursuant to the procedural rule of F.R.Civ.P. Rule 41(b) which states in pertinent part:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a

> party under Rule 19, operates as an adjudication on the merits.

As stated above, the Tenth Circuit's decision completely disregards the language of the Supreme Court in *Costello, supra,* which refers to dismissals for jurisdictional reasons. The applicable language in *Costello* states:

> "We think that petitioner misconceives the scope of this exception from the dismissals under Rule 41(b) which operate as adjudications on the merits unless the court specifies otherwise. . . . We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim."

The Tenth Circuit applied the incorrect construction of F.R.Civ.P. Rule 41(b) by holding that a procedural rule supplies the controlling principal when determining whether a case was determined upon the merits or not.

The Tenth Circuit Court of Appeals incorrectly followed the lead of the Fourth Circuit in *Shoup v. Bell and Howell Co., supra,* when it determined that F.R.Civ.P. Rule 41 must be considered in determining if a dismissal for statute of limitations purposes is "on the merits". The Tenth Circuit then followed the decision of *DeVargas v. Montoya,* 796 F.2d 1245 (10th Cir., 1986) which held that under New Mexico law a dismissal with prejudice by the state court constituted an adjudication on the merits for the purpose of claim preclusion in a later United States District Court for the District of New Mexico action. The Court then found that the dismissal was not for lack of

jurisdiction, improper venue or for failure to join a party and found that the dismissal was based upon the merits.

The Tenth Circuit did not consider the entire language of the order of dismissal entered by the United States District Court for the District of Kansas. The Final Order stated:

> "IT IS ORDERED AND ADJUDGED that plaintiff's action is dismissed with prejudice for failure to file it within the limitation period of K.S.A. 60-513." (See Appendix C attached.)

The first clause of F.R.Civ.P. Rule 41(b) states:

> Unless the court in its order for dismissal otherwise specifies . . .

The United States District Court for the District of Kansas otherwise specifies that the case "is dismissed with prejudice *for failure to file it within the limitation period of K.S.A. 60-513.*" Such a decision is an exception to the general rule and enunciated exceptions stated in F.R.Civ.P. Rule 41(b). Therefore, the decision by the United States District Court for the District of Kansas is not a decision on the merits, it was a decision based upon the failure to abide by the Kansas statute of limitations, and only prejudices plaintiff's right to proceed under the *Kansas* statute of limitations.

There is a split in authority whether a dismissal based upon failure to file the lawsuit within the time frame outlined by the statute of limitations is a dismissal upon the merits as stated in F.R.Civ.P. Rule 41(b). The United States Supreme Court in *Costello, supra,* has given the exceptions enunciated in F.R.Civ.P. Rule 41(b) a wider interpretation than certain Circuit Courts of Appeals. The

Supreme Court in *Costello, supra,* held that F.R.Civ.P. Rule 41(b) did not change the common law principle that dismissal of a complaint for the failure of a precondition, so that the merits could not be reached, does not bar a subsequent action on the same claim in a different jurisdiction. This Court's wider interpretation of the exceptions stated in F.R.Civ.P. Rule 41(b) have been followed by several federal courts. See *Honson v. Columbus Bank and Trust Co.,* 651 F.2d 320 (5th Cir., 1981); *Chang v. Northwestern Memorial Hospital,* 549 F.Supp. 90 (N.D. Ill., 1982). Interestingly enough, New Mexico state courts have held that its statute of limitations merely bars the remedy and does not determine the underlying validity of the claim on the merits. See *Britton v. Britton,* 100 N.M. 424, 671 P.2d 1135 (1983).

On the other hand, several Circuit Courts have determined that dismissal on statute of limitations grounds is, under F.R.Civ.P. Rule 41(b), a dismissal on the merits. *PRC Harris, Inc. v. Boeing Co.,* 700 F.2d 894 (2d Cir.) *cert. denied,* 464 U.S. 936 (1983); *Shoup, supra; Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.,* 870 F.2d 1044 (5th Cir., 1989); *Rose v. Town of Harwich,* 778 F.2d 77, *cert. denied,* 476 U.S. 1159 (1986); *Johnson v. Burnley,* 887 F.2d 471 (4th Cir., 1989). These decisions deviate from the Supreme Court's previous ruling in *Costello, supra,* and must be reversed on those grounds.

The decision by the Tenth Circuit uses a federal procedural rule, F.R.Civ.P. Rule 41(b), to deny a party his substantive rights under New Mexico law. N.M. Stat. Ann. 37-1-8 provides for a three year statute of limitations. Further, N.M. Stat. Ann. 37-1-14 provides:

> "If after the commencement of an action, the plaintiff fails therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated by deemed a continuation of the first."

The case was initiated in the United States District Court for the District of Kansas. The accident occurred in New Mexico. The case was refiled in New Mexico state courts and removed by the defendant to the United States District Court for the District of New Mexico. The right to litigate a cause of action in New Mexico is a substantive right of all persons. The concept of federalism will not allow a federal procedural rule, such as F.R.Civ.P. Rule 41(b), to circumvent a state's legislatively and judicially adopted substantive law that provides plaintiff with a right to bring his case in state court.

REASONS FOR GRANTING THE WRIT

I. THE CASE INVOLVES ISSUES OF NATIONAL IMPORTANCE BECAUSE OF THE DIFFERENT INTERPRETATIONS OF F.R.CIV.P. RULE 41(b) GIVEN BY THE COURTS

The case at bar involves the scope of the Federal Rules of Civil Procedure which are used to govern the proceedings in the United States District Courts. The Federal Rules of Civil Procedure are the supreme procedural laws in the land. Uniformity is needed in interpreting the federal rules. In addition, variations of the Federal Rules of Civil Procedure are used by numerous state courts. The state courts look to the federal rules

decisions as persuasive authority in making their own procedural determinations. Because of the importance in having the Federal Rules of Civil Procedure being interpreted uniformly across the country by both state and federal courts, this is a matter involving national importance.

There is a split in authority on the interpretation given F.R.Civ.P. Rule 41(b). One line of authority follows the United States Supreme Court decision in *Costello, supra*. The other line of authority follows the Fourth Circuit's lead in *Shoup, supra*. The United States Supreme Court needs to grant a Writ of Certiorari to clear up the difference in opinions between the appellate courts in the United States. The United States Supreme Court, as indicated by *Costello, supra*, implies that F.R.Civ.P. Rule 41(b) would not prevent for *res judicata* purposes the refiling of a case in another jurisdiction where the case had been dismissed for failure to abide by the original state's statute of limitations when the case that has been refiled would not violate the statute of limitations in the state where the case has been refiled. On the other hand, several Circuit Courts have ruled the opposite way. The Circuits have held that, pursuant to F.R.Civ.P. Rule 41(b), a dismissal of a case for failure to abide by the statute of limitations is an adjudication on the merits. The Court must decisively rule on this split in opinion.

II. THE CONCEPT OF FEDERALISM WILL NOT ALLOW A FEDERAL PROCEDURAL RULE TO EXTINGUISH A STATE SUBSTANTIVE RIGHT

The concept of federalism requires that the Supreme Court of the United States remand to the lower federal

courts the issue of whether the dismissal of a case for failure to abide by another state's statute of limitations precludes the filing of the case in another state which has a longer statute of limitations. The United States District Courts for the Districts of Kansas and New Mexico and the Tenth Circuit Court of Appeals have denied the plaintiff a substantive state right under New Mexico Stat. Ann. 37-1-8 and 37-1-14 to present its case by way of a federal procedural rule, specifically F.R.Civ.P. Rule 41(b). The Supreme Court of the United States must reverse the decision of the Tenth Circuit Court of Appeals and remand the proceeding back for determination of the substantive rights the plaintiff has under the New Mexico statute of limitations and savings statutes.

CONCLUSION

The Court should grant a Writ of Certiorari and set the case for full briefing and argument on the merits of the procedural law which has determined the outcome of this litigation. The federal issue concerning the Federal Rules of Civil Procedure are too important, and have too great an impact upon the federal district courts and the state courts which have implemented the Federal Rules of Civil Procedure to be permitted to continue interpreting F.R.Civ.P. Rule 41(b) in the manner it has been interpreted. Finally, the concept of federalism will not allow a federal procedural rule to circumvent a state's judicially

and legislatively adopted substantive law that provides plaintiff with a right to bring his case under state law.

Respectfully submitted,

ROBERT L. POTTROFF
WM. SCOTT HESSE
MYERS, POTTROFF & BALL
320 Sunset Avenue
Post Office Box 489
Manhattan, KS 66502-0004
(913) 539-4656
Supreme Court ID# 12013
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT E. MURPHY, Plaintiff-Appellant, v. KLEIN TOOLS, INC, previously known as Mathias Klein & Sons, Inc., Defendant-Appellee.	)	No. 90-2195

ORDER

Filed June 7, 1991

Before LOGAN, MOORE and BALDOCK, Circuit Judges.

Appellant's petition for rehearing is granted in part. The panel withdraws the order and judgment filed April 5, 1991 and substitutes the published opinion filed today. The panel having acted, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROBERT E. MURPHY, Plaintiff-Appellant, vs. KLEIN TOOLS, INC, previously known as Mathias Klein & Sons, Inc., Defendant-Appellee.	)	No. 90-2195

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 89-1135-SC)

(Filed Jun. 7, 1991)

Submitted on the briefs:*

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case therefore is ordered submitted without oral argument and plaintiff-appellant's request for oral argument is denied.

Robert L. Pottroff, of Myers, Pottroff & Ball, Manhattan, Kansas and David J. Stout, of Carpenter & Goldberg, P.A., Albuquerque, New Mexico, for Plaintiff-Appellant.

Robert J. O'Connor & David E. Bengtson, of Hershberger, Patterson, Jones & Roth, Wichita, Kansas and Robert E. Arroyo, of Keck, Mahin & Cate, Chicago, Illinois, for Defendant-Appellee.

Before LOGAN, MOORE and BALDOCK, Circuit Judges.

PER CURIAM.

Plaintiff-appellant Robert E. Murphy appeals the district court's grant of summary judgment to defendant-appellee Klein Tools, Inc. and subsequent dismissal of plaintiff's action with prejudice. We affirm.

Plaintiff was injured in a fall from an electrical transmission tower near Farmington, New Mexico on August 14, 1980. Plaintiff claims his fall and resulting injuries were caused by a defective swivel hook designed and manufactured by defendant. Plaintiff is a resident of the State of Kansas and defendant is a Delaware corporation. Plaintiff filed his initial complaint against defendant, almost three years after the accident, on August 12, 1983, in the United States District Court for the District of Kansas. Upon motion of defendant, the action was dismissed for failure to comply with the two-year limitation period of Kan. Stat. Ann. § 60-513. The court also denied plaintiff's motions to transfer the action to the United

States District Court for the District of New Mexico and to amend his complaint. Prior to entry of final judgment, plaintiff moved the court requesting judgment be entered without prejudice. The court denied this request and final judgment of dismissal was entered *with prejudice* on September 5, 1989. Plaintiff failed to appeal any of these decisions.

On February 20, 1989, prior to entry of judgment in Kansas, plaintiff filed an identical complaint in New Mexico state court which he amended on April 24, 1989. Neither the complaint nor the amended complaint was ever served on defendant. Although the record lacks any formal dismissal of this state action, plaintiff filed a second state action on September 1, 1989, which was ultimately served on defendant. Defendant removed this action to the United States District Court for the District of New Mexico based on diversity of citizenship and amount in controversy. Defendant then moved for dismissal or in the alternative for summary judgment, based on statute of limitations and res judicata. The district court granted summary judgment, finding plaintiff's action to be barred by the doctrine of res judicata. It is this decision that is before this court on appeal.

We review a grant of summary judgment de novo, applying the same legal standards used by the district court. Fed. R. Civ. P. 56(c). We resolve all factual disputes and draw all inferences in favor of the nonmoving party. *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951, 979 (10th Cir.), *cert. denied*, 110 S. Ct. 3241 (1990); *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1230 (10th Cir. 1990).

The district court, relying heavily and exclusively on *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1989), concluded that plaintiff's action was barred because the Kansas court's dismissal on statute of limitations grounds was an adjudication on the merits. In *Shoup*, the Fourth Circuit held that a dismissal on statute of limitations grounds by one federal court bars the same claim from litigation in another federal court, stating that "pursuant to Fed. R. Civ. P. 41(b)[1] the earlier statute of limitations ruling is a judgment on the merits subject to claim preclusion." *Id.* at 1178. We agree that when the preclusive effects of federal court dismissal decisions are at issue, Rule 41(b) must be considered. *See Sack v. Low*, 478 F.2d 360, 364 (2d Cir. 1973). *Bertha Bldg. Corp. v. National Theatres Corp.*, 248 F.2d 833, 835 (2d Cir. 1957), *cert. denied*, 356 U.S. 936 (1958).

Plaintiff argues that our determination in *Stokke v. Southern Pacific Co.*, 169 F.2d 42 (10th Cir. 1948), should control. In *Stokke*, we held that a dismissal on statute of limitations grounds bars only "the legal remedy for the enforcement of the right of action" in the dismissing forum, and is not res judicata as to an action in another forum. *Id.* at 43. As Professor Moore has noted, however, our determination in *Stokke* relied upon principles (and

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[1] Fed. R. Civ. P. 41(b) provides in part:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication on the merits.

authority) predating the adoption of the Federal Rules of Civil Procedure and did not reference rule 41(b). 1B J. Moore, J. Lucas & T. Currier, ¶ 0.409[6] at 339-40 (1991). We hold that *Stokke* is no longer controlling on this point.[2] We now decide the issue according to Rule 41(b).

"[T]he scope of a federal judgment is governed by Rule 41(b), Fed. R. Civ. P. . . . and . . . the Federal Rule supplies the controlling principle . . . . " *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978). This court's decision in *DeVargas v. Montoya*, 796 F.2d 1245 (10th Cir. 1986), applying New Mexico law, determined that a dismissal with prejudice by the state court constituted an adjudication on the merits for the purpose of claim preclusion in a later federal court action. *Id.* at 1249. We therefore agree with the Sixth Circuit and other circuits in holding that a dismissal on limitations grounds is a judgment on the merits. *See Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1046 (5th Cir. 1989) (res judicata effect shall be given to judgments which are

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[2] We are authorized to state that, in light of Fed. R. Civ. P. 41(b) and modern federal authority, the en banc court approves of overruling the following statement:

> It is the general rule that a judgment dismissing an action on the ground that it is barred by limitations merely determines that the legal remedy for the enforcement of the right of action is barred in that forum; that it does not extinguish the right; and that it therefore does not constitute res judicata which forecloses the maintaining of a subsequent action in another state where the right is not barred by local law.

Stokke, 169 F.2d at 43.

dismissed on statute of limitations grounds); *Rose v. Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985) (limitations-based dismissal is one with claim preclusive effect), *cert. denied*, 476 U.S. 1159 (1986); *Johnson v. Burnley*, 887 F.2d 471, 474 (4th Cir. 1989) (dismissal on statute of limitations grounds operates as res judicata); *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896 (2d Cir.) (dismissal on statute of limitations grounds is adjudication on the merits unless it is specifically stated to be without prejudice), *cert. denied*, 464 U.S. 936 (1983).

Plaintiff further argues that his New Mexico case is saved by New Mexico's savings statute, N.M. Stat. Ann. § 37-1-14,[3] and cites this court's decision in *Prince v. Leesona Corp.*, 720 F.2d 1166 (10th Cir. 1983) in support. We conclude that the holding in *Prince*, that state savings statutes are applicable to actions originally filed in sister states, is inapposite in this case. *See id.* at 1169. The facts in *Prince* are distinguishable. In *Prince*, plaintiff's action was *timely* filed in the original forum and dismissed on grounds other than statute of limitations. *Id.* at 1167.

The Supreme Court stated, in discussing savings statutes in general, "[s]uch a statute specifically gives to a plaintiff whose *timely action* is dismissed for procedural reasons such as improper venue a specified time in which

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[3] N.M. Stat. Ann. § 37-1-14 provides:

> If after the commencement of an action, the plaintiff fails therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated be deemed a continuation of the first.

to bring a second action." *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 432 (1965) (emphasis added). As we have determined that plaintiff's claim is barred on res judicata grounds, he cannot invoke the savings statute to claim continuation of an action which never existed. *See DeVargas v. Montoya*, 796 F.2d at 1250.

We have reviewed *Bracken v. Yates Petroleum Corp.*, 760 P.2d 155 (N.M. 1988), cited by plaintiff to support his contention that the statute of limitations in New Mexico was tolled by the filing of his Kansas action, and find, as did the district court, that we have no need to reach the issue of the New Mexico statute of limitations due to our holding that plaintiff's action is barred by res judicata. We have reviewed plaintiff's other arguments and find them also meritless.

The district court of Kansas dismissed plaintiff's claim, specifying that the dismissal judgment was *with prejudice*. We do not decide whether this decision was correct. However, we must assume that plaintiff had no quarrel with the decision as he elected not to appeal. "[A]n erroneous judgment fairly and regularly entered by a court of competent jurisdiction is nevertheless an effective bar under the doctrine of res judicata to a subsequent action between the same parties on the same cause of action." *Stokke*, 169 F.2d at 43. When plaintiff took no appeal, the Kansas judgment became final. We conclude the judgment was on the merits and thus res judicata as to subsequent actions. Plaintiff cannot forum shop in an effort to remedy his unexplained delay.

Defendant's request for sanctions pursuant to Fed. R. App. P. 38 is DENIED. The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

ROBERT E. MURPHY,

Plaintiff,

vs.

KLEIN TOOLS, INC., previously known as Mathias Klein & Sons, Inc.,

Defendant.

No. CIV-89-1135 SC

ENTERED ON DOCKET
8-8-90

MEMORANDUM OPINION AND ORDER

(Filed Aug. 08, 1990)

This is an action in products liability and negligence for personal injury to Plaintiff, Robert E. Murphy. Murphy claims to have been injured by the failure of a swivel hook, made by Defendant Klein Tools, Inc., which swivel hook Plaintiff claims was defective. This matter is presently before the Court on Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. The Court finds Defendant's motion to be well-taken and it will be granted.

BACKGROUND

The following narrative is derived from Defendant's Statement of Uncontroverted Material Facts which Plaintiff does not dispute. This action arises out of an injury Plaintiff sustained on August 14, 1980 when he fell ninety (90) feet from an electrical transmission tower. Plaintiff was working on the tower which was located near Farmington, New Mexico. Plaintiff claims that his fall was caused by the failure of Defendant's swivel hook which

Plaintiff alleges was negligently designed, manufactured and sold by Defendant.

Plaintiff, a resident of Kansas, filed a Complaint in the United States District Court for the District of Kansas on August 12, 1983 against Defendant, a resident of Delaware (Cause No. 83-1764). The August 12, 1983 filing was two days less than three years after the injury to Plaintiff. Defendant filed a Motion for Summary Judgment in the Kansas Federal Court on the ground that the action was barred by the two-year Kansas statute of limitations. The Kansas Federal Court, the Honorable Sam A. Crow presiding, granted Defendant's motion by its Order entered on August 22, 1988. Judge Crow also denied Plaintiff's motion to transfer the case to the District of New Mexico and to amend the Complaint. On August 14, 1989, Plaintiff filed a motion asking Judge Crow to specify that the order of dismissal was without prejudice. Judge Crow denied that motion and entered a final judgment on September 5, 1989. In that Final Judgment, the Court ordered "that plaintiff's action is dismissed with prejudice for failure to file it within the limitation period of K.S.A. 60-513." Plaintiff did not appeal the September 5, 1989 judgment and that judgment is now final. The present Complaint was filed in the Eleventh Judicial District Court, San Juan County, New Mexico, on September 1, 1989. Defendant filed a Notice of Removal to this Court on October 16, 1989.

Defendant now asserts the affirmative defenses of *res judicata* and statute of limitations. A motion to dismiss for failure to state a claim is not appropriate here. The success or failure of an affirmative defense is not relevant to Fed. R. Civ. P. 12(b)(6). Therefore, the Court will treat

Defendant's motion as strictly one for summary judgment. Due to the Court's analysis of the *res judicata* issue, the statute of limitations defense will not be addressed.

DISCUSSION

In deciding the motion for summary judgment, the Court has considered Rule 56 and has applied the standards announced in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1377 (10th Cir. 1988); *Instructional Systems Dev. Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639, 642 (10th Cir. 1987). For the Court to grant summary judgment, there must be no genuine issue of material fact for trial, the evidence must be viewed in the light most favorable to the party opposing the motion, the Court may not weigh evidence to determine credibility of witnesses, and any factual inferences tending to show triable issues must be resolved in Plaintiff's favor. However, the party opposing summary judgment must make a showing sufficient to establish the existence of each element essential to that party's case and on which that party would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Federal law determines the preclusive effect of a prior federal judgment. *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989). The question as to whether a particular judgment is on the merits is also a federal issue. *Id.* The parties agree that the only element of *res judicata* which is at issue here is the requirement of a final judgment on the merits. Plaintiff argues that the final

judgment of the Kansas Federal Court was not on the merits, Defendant argues that it was.

Rule 41(b) of the Federal Rules of Civil Procedure deals with involuntary dismissals. The last sentence of Rule 41(b) provides:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

First, the Kansas action was dismissed because it was barred by a statute of limitations, not for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19. Second, Judge Crow explicitly provided that the final judgment was dismissing Plaintiff's claims *with prejudice*. As rule 41(b) provides, the judgment would be "on the merits" even if Judge Crow had remained silent on this issue. Third, the final judgment "with prejudice" was not an accident or oversight. Judge Crow denied Plaintiff's motion requesting an order of dismissal without prejudice.

Finally, *Shoup v. Bell & Howell Co., supra,* is nearly on point. In *Shoup,* as here, the Plaintiffs, after losing once on statute of limitations grounds, refiled their complaint in a jurisdiction with a longer statute of limitations. The Fourth Circuit Court of Appeals held that a dismissal on statute of limitations grounds in the United States District Court for the Eastern District of Pennsylvania was an adjudication on the merits. *Shoup* held that the Pennsylvania action barred the subsequent action filed in the

United States District Court for the District of Maryland on *res judicata* grounds.

The situation here is identical. The dismissal of Plaintiff's action in the District of Kansas bars this action by action of the doctrine of *res judicata*.

IT IS, THEREFORE, ORDERED that Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment should be, and hereby is, GRANTED.

Defendant is granted summary judgment on Plaintiff's Complaint for Personal Injury.

/s/ Hon. Santiago E. Campos
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

ROBERT E. MURPHY,

Plaintiff,

vs.

KLEIN TOOLS, INC., previously known as Mathias Klein & Sons, Inc.,

Defendant.

CIV. No. 89-1135 SC

ENTERED ON DOCKET
8-16-90

JUDGMENT

This matter came before the Court on the Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on all claims set forth in the complaint of Plaintiff Robert E. Klein.

THE COURT, having read the memoranda submitted by the parties, and the exhibits thereto, and being apprised of the applicable law, finds that no genuine issue of material fact exists as to Plaintiff's claims and that the motion for summary judgment of Defendant Klein Tools, Inc. should be granted. The Court's reasoning is set forth in the memorandum opinion issued by the Court on August 8, 1990.

THEREFORE, IT IS ORDERED AND ADJUDGED that Plaintiff Robert E. Murphy take nothing and that the complaint in this action should be, and hereby is, DISMISSED WITH PREJUDICE.

/s/ Hon. Sam Crow
UNITED STATES
DISTRICT JUDGE

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

ROBERT F. MURPHY

V.

KLEIN TOOLS, INC.

FINAL JUDGMENT IN A CIVIL CASE
(Filed Sept. 5, 1989)
CASE NUMBER:
83-1764-C

___ **July Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's action is dismissed with prejudice for failure to file it within the limitation period of K.S.A. 60-513.

ENTERED ON THE DOCKET
DATE: 9-5-89

September 05, 1989
Date

RALPH L. DeLOACH
Clerk

/s/ Leslie Lewis
(By) Deputy Clerk
Leslie Lewis